Supreme Court, U.S.
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No. 01-656

IN THE

Supreme Court of the United States

A.D. BEDELL WHOLESALE COMPANY, INC., TRIANGLE CANDY & TOBACCO CO., on behalf of themselves and all others similarly situated,
Petitioners,

v.

PHILIP MORRIS INCORPORATED, R.J. REYNOLDS TOBACCO COMPANY, INC., BROWN AND WILLIAMSON TOBACCO CORP.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1) Whether the Court of Appeals correctly applied the *Noerr-Pennington* doctrine in holding that Respondents were not liable under the antitrust laws for successfully petitioning state governments to resolve the litigation that these state governments had filed against them.

2) Whether the Court of Appeals correctly declined to address constitutional claims that Petitioners had not alleged in their complaint.

3) Whether the judgment of the Court of Appeals could also be sustained on an alternative ground relied upon by the District Court – namely, that Respondents' settlement with state governments constitutes "state action" under the *Parker v. Brown* doctrine.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

All parties to the proceeding in the Third Circuit are listed in the caption on the cover of this Brief in Opposition. Pursuant to Supreme Court Rule 29.6, Respondents identify the following parent corporations and publicly held corporations owning ten percent or more of Respondents' stock:

Philip Morris Incorporated:
Philip Morris Companies Inc.

R. J. Reynolds Tobacco Company, Inc.:
R. J. Reynolds Tobacco Holdings, Inc.

Brown & Williamson Tobacco Corp.:
B.A.T. Industries p.l.c.
BATIC Inc.
BATUS Holdings Inc.
BATUS Tobacco Services, Inc.
British American Tobacco p.l.c.
British American Tobacco (1998) Ltd.
British-American Tobacco (Holdings) Ltd.
Louisville Securities Ltd.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

PRELIMINARY STATEMENT

Petitioners are two cigarette wholesalers who contend that Respondent cigarette manufacturers violated the antitrust laws by successfully petitioning state governments to settle litigation against them. Petitioners attack this settlement even though it (i) was negotiated with the state attorneys general, (ii) was approved by state and federal courts in the states, and (iii) was subsequently endorsed by the legislatures of the states.

The Court of Appeals unanimously affirmed the District Court's ruling that Respondents' conduct was immune from antitrust liability under the well-established *Noerr-Pennington* doctrine. This decision makes no new law. This Court has expressly held that *Noerr-Pennington* applies to the petitioning of state governments and to litigation-related conduct. Several other courts have adjudicated challenges to this same settlement, and all of these courts applied the *Noerr-Pennington* doctrine in exactly the same fashion as the Court of Appeals below. Indeed, this Court has already denied certiorari in one of these cases. *Hise v. Philip Morris Inc.*, 531 U.S. 959 (2000).

Petitioners strain to concoct a conflict regarding the application of the *Noerr-Pennington* doctrine, but their effort is futile. No case supports Petitioners' contentions that *Noerr-Pennington* immunity does not apply to private litigants who petition the government to resolve litigation against them, or that *Noerr-Pennington* immunity protects only the petitioning process and not the government's response to such petitioning. To the contrary, this Court's decisions in the *Noerr* and *Pennington* cases recognized that antitrust immunity protects private parties *not only* from claims arising from their efforts to petition the government, *but also* from claims arising from any "restraints" that the government implements in response to such petitioning. *See infra* pp. 14-16. Petitioners' complaint challenged the litigation settlement *with the states*, along with the statutes enacted *by the states* to further the settlement's purposes. *Noerr-Pennington* unquestionably protects private parties from antitrust liability for such "post-petitioning" conduct involving the government, as this Court has consistently held.

In the absence of any real conflict, Petitioners argue that the Court of Appeals incorrectly "applied" the *Noerr-Pennington* doctrine to the facts of this case, and that this Court should grant certiorari in order to "brighten[] the

demarcation line" between the *Noerr-Pennington* doctrine and the *Parker* ("state action") doctrine. Pet. at 19-20. Yet there is no line that is in need of "brightening." Any confusion between these two doctrines rests solely with Petitioners. The Court of Appeals' application of *Noerr-Pennington* follows longstanding precedents of this Court, which clearly establish the parameters of the *Noerr-Pennington* doctrine.

STATEMENT OF THE CASE

1. *Factual Background.* In 1998, Respondents successfully petitioned forty-six states (as well as the District of Columbia and five territories) to enter into the Master Settlement Agreement ("MSA"), a comprehensive resolution of lawsuits brought by these states against Respondents, seeking monetary and injunctive relief (the "State Lawsuits").[1] The State Lawsuits "[e]ndeavor[ed] to recoup billions of dollars in public health care costs and to reduce cigarette smoking . . . ." App. 2a. Under the MSA, the states have required Respondents, *inter alia*, to restrict their cigarette marketing and advertising activities, to fund a program of public education to deter youth smoking, and to make payments – totaling more than $200 billion – to the settling states and territories. The MSA imposes detailed, mandatory requirements specifying how Respondents must calculate their settlement payments to the states.

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[1] Curiously, Petitioners devote a significant portion of their petition to describing and attacking a failed congressional proposal (the so-called "National Settlement") that would have settled these lawsuits a year earlier. The terms of the failed legislative proposal (including a legislative antitrust exemption that was broader than the *Noerr-Pennington* doctrine) were significantly different from the terms of the MSA. *See* Pet. at 5-8. While perhaps interesting by way of historical background, the unsuccessful legislative proposal has no bearing on the legal issues that Petitioners are asking this Court to review.

Ignoring the significant public benefits derived from the MSA, and ignoring the fact that attorneys general from more than forty states filed an amicus brief in the Court of Appeals detailing the state interests served by the MSA, Petitioners use inflammatory language to mischaracterize the MSA as a "cartel" that supposedly penalizes "renegade" cigarette manufacturers and restricts cigarette output. Their petition contains significant misstatements regarding the terms of the MSA.[2] Yet the focus of Petitioners' attack on the MSA is the mandatory settlement payments that the settling cigarette manufacturers are required to make to the states. Like any settlement agreement, the payments to the states required by the MSA increase the costs of doing business for the settling companies.

After the MSA was negotiated with the state attorneys general, it was approved by state and federal courts in all applicable jurisdictions, in conjunction with the entry of judgments dismissing the underlying State Lawsuits. The MSA was subsequently endorsed by the legislatures in these states, which enacted legislation to further the purposes of the MSA. *See* App. 39a. In sum, the MSA resulted from successful petitioning of all three branches of government – executive, judicial, and legislative. In addition, the implementation of the MSA is overseen by the state attorneys

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[2] For example, Petitioners state that the MSA sets up an "output cartel" that imposes "substantial penalties" on subsequent participating cigarette manufacturers who increase their output. Pet. at 9-10. Yet the MSA in fact contains no provisions limiting output, and the MSA payment provisions actually treat these subsequent participating manufacturers more favorably than Respondents. Similarly, Petitioners assert that the state "Escrow Statutes" force new manufacturers "into paying for the past sins of the Majors . . . ." Pet. at 11. Yet in truth, these state statutes (which, in any event, could not possibly be deemed to be acts of Respondents) simply require such manufacturers to deposit funds into escrow to satisfy *actual court judgments* against such manufacturers. App. 14a.

general, and the state and federal courts that approved the MSA retain jurisdiction over the signatories for purposes of interpreting and enforcing the terms of the MSA. Congress has also recognized the existence of the MSA and has authorized states to use MSA payments "for any expenditures determined appropriate by the State[s]." 42 U.S.C. § 1396b(d)(3)(B) (2001).

2. *Proceedings in the District Court.* Petitioners' complaint (and amended complaint) contained three antitrust counts. No constitutional claims were alleged. The first two counts alleged that Respondents violated the antitrust laws by negotiating and entering into the MSA with the states. The third count, which Petitioners dismissed voluntarily and which was not before the Court of Appeals, alleged that one of the Respondents violated the antitrust laws by acquiring three cigarette trademarks from a non-defendant company.

Respondents filed a timely motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). On March 22, 2000, the District Court granted Respondents' motion to dismiss the claims challenging the MSA, and Petitioners voluntarily dismissed the remaining count.

The District Court held that because the claims were "based upon the Defendants' actions in negotiating and executing the MSA, said actions fall within the category of conduct protected by the *Noerr-Pennington* immunity doctrine . . . ." App. 75a. The District Court further held that the alleged conduct was "not subject to the 'sham' exception to the *Noerr-Pennington* immunity doctrine." *Id.* As an alternative grounds for dismissal, the District Court held that Respondents' conduct in "entering into, implementing and executing the [MSA] with the settling states . . . similarly is protected under the [*Parker v. Brown*] state action immunity doctrine." App. 77a.

3. *Proceedings in the Court of Appeals.* On June 19, 2001, the United States Court of Appeals for the Third Circuit unanimously affirmed. The Court of Appeals agreed with the District Court that "defendants are immune [from antitrust liability] under the *Noerr-Pennington* doctrine." App. 32a. On this basis, the Court of Appeals affirmed the judgment below. In *dicta*, the Court of Appeals disagreed with the District Court's alternative holding that Petitioners' antitrust claims would also be barred by the *Parker v. Brown* "state action" immunity doctrine. App. 60a. However, the *dicta* regarding the *Parker* doctrine did not affect the Court of Appeals' judgment affirming the District Court. Petitioners sought rehearing by the panel and by the Court of Appeals *en banc*. On July 24, 2001, Petitioners' requests for rehearing were denied. App. 89a-90a.

REASONS FOR DENYING THE WRIT

This petition is both substantively and procedurally baseless. First, the Court of Appeals made no new law; it simply applied the well-established *Noerr-Pennington* doctrine of antitrust immunity to the facts of this case. This Court has already denied certiorari in a case arising from the same facts, which applied *Noerr-Pennington* in the same fashion. *Hise v. Philip Morris Inc.*, 531 U.S. 959 (2000).

Second, the decision below does not conflict with any other court decision. *Every* court to date that has considered an antitrust challenge to the MSA has applied *Noerr-Pennington* in the same manner as the Court of Appeals below. The Court of Appeals' ruling that *Noerr-Pennington* may apply regardless of whether the petitioned-for government conduct meets the independent requirements for "state action" immunity is consistent with longstanding precedent. There is no need for this Court to exercise its supervisory powers in light of the uniformity of lower court decisions.

Third, because Petitioners did not allege constitutional claims in their complaint, the Court of Appeals correctly declined to consider the constitutional claims on appeal. Furthermore, the constitutional arguments are not relevant to the application of the *Noerr-Pennington* doctrine in this case.

Finally, Supreme Court review would be an inefficient use of this Court's resources because the judgment below may also be affirmed on an alternative ground, which was relied upon by the District Court – i.e., that the MSA is also entitled to immunity under the *Parker v. Brown* doctrine.

I. THERE IS NO CONFLICT: THE DECISION BELOW APPLIES *NOERR-PENNINGTON* TO THE MSA IN PRECISELY THE SAME MANNER AS EVERY OTHER COURT THAT HAS ADJUDICATED CHALLENGES TO THE MSA.

In the proceedings below, Petitioners alleged that Respondents violated the federal antitrust laws by successfully petitioning state attorneys general to enter into the MSA to resolve litigation brought by the states against them. Like every other court that has considered antitrust challenges to the MSA, both the District Court and the Court of Appeals held that defendants are immune from antitrust liability for entering into this judicially-approved litigation settlement, by virtue of the well-established *Noerr-Pennington* doctrine.

Grounded in the First Amendment, the *Noerr-Pennington* doctrine allows private parties to petition the executive, legislative, or judicial branches of government, free from antitrust liability. *E. R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 135-36 (1961); *United Mine Workers of Am. v. Pennington*, 381 U.S. 657, 669-72 (1965). In *Noerr*, this Court held that efforts to petition the government are immune from antitrust liability, regardless of any anticompetitive motivation or effect of such

petitioning efforts. *Noerr*, 365 U.S. at 138-40. This Court reaffirmed the importance of *Noerr*'s First Amendment protection a few years later:

> We conclude that it would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors.

Cal. Motor Transp. Co. v. Trucking Unlimited, 404 U.S. 508, 510-11 (1972). Consistent with this Court's precedents, every court that has considered whether *Noerr-Pennington* immunizes Respondents' conduct in negotiating and entering into the MSA has ruled that it does.

For example, in *Hise v. Philip Morris Inc.*, 46 F. Supp. 2d 1201 (N.D. Okla. 1999), *aff'd mem.*, 208 F.3d 226 (10th Cir. 2000), *cert. denied*, 531 U.S. 959 (2000), the district court dismissed plaintiffs' antitrust and constitutional challenges to the MSA. The court held that "defendants' activities, in negotiating the [MSA] with the several settling states and achieving a settlement agreement with those states, are protected under the *Noerr-Pennington* doctrine as conduct incidental to litigation." *Id.* at 1206. The court recognized that:

> [The *Noerr-Pennington*] doctrine would surely ring hollow if it failed to encompass private entities who, after having been sued by one or more states for similar conduct, jointly petition the states in order to achieve a mutually acceptable settlement, designed to reduce the amount of time and expense involved in defending the action.

Id. On appeal, the Tenth Circuit, relying on the "well-reasoned decision" of the district court, affirmed the district

court's decision. *Hise v. Philip Morris Inc.*, No. 99-5113, 2000 WL 192892, at *4 (10th Cir. Feb. 17, 2000).

Indeed, in the *Hise* case, one of the Petitioners herein – A.D. Bedell – filed an *amicus curiae* brief in the Tenth Circuit raising the same antitrust arguments against the MSA that it seeks to raise here. *Hise*, 2000 WL 192892, at *2 n.3. The Tenth Circuit, like the Court of Appeals below, affirmed the district court ruling that the MSA is entitled to antitrust immunity under *Noerr-Pennington*. *Id.* at *4. This Court denied certiorari in the *Hise* case on October 30, 2000.

Other courts have also applied *Noerr-Pennington* in exactly the same manner as the Court of Appeals below. In *PTI, Inc. v. Philip Morris Inc.*, 100 F. Supp. 2d 1179 (C.D. Cal. 2000), the court dismissed antitrust and constitutional challenges to the MSA brought by cigarette importers and distributors. The court held that defendants are immune under the *Noerr-Pennington* doctrine "for their activities involved with the negotiation, execution, and attempts to implement the MSA . . . ." *Id.* at 1193. The court further explained that "such conduct is precisely the type of activity the [*Noerr-Pennington*] doctrine was intended to protect." *Id.* The court in *PTI* dismissed allegations similar to those that Petitioners seek to raise here: namely, allegations that the MSA contains an illegal *per se* output restriction and that the MSA violates the Interstate Compact Clause and Commerce Clause of the Constitution. *Id.* at 1197-1203.[3]

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[3] Similarly, in *Forces Action Project LLC v. California*, No. C 99-0607 MJJ, 2000 WL 20977 (N.D. Cal. Jan. 5, 2000), *aff'd in part, rev'd in part*, No. 00-15280, 2001 WL 923124 (9th Cir. Aug. 15, 2001), the district court dismissed a constitutional challenge to the MSA. The district court observed that "defendants' action in negotiating and entering into the M.S.A. are immunized from suit under *Noerr-Pennington*." 2000 WL 20977, at *8. The Ninth Circuit affirmed this dismissal, but reversed the district court's procedural ruling that the plaintiff could not amend its complaint to add new claims. 2001 WL 923124, at *1-2. The Ninth

Like every other court that has considered whether *Noerr-Pennington* immunizes Respondents' MSA-related conduct, the Court of Appeals below concluded "that defendants engaged in petitioning activity with sovereign states and are immune under the *Noerr-Pennington* doctrine." App. 27a. The Court found "no reason to distinguish between settlement agreements and other aspects of litigation between private actors and the government which give rise to antitrust immunity." App. 31a.

In sum, no court has ever held that defendants' negotiation or execution of the MSA falls outside the scope of the *Noerr-Pennington* doctrine. The MSA was negotiated with state attorneys general, was approved by state and federal courts in conjunction with the entry of judgments implementing the settlement in each state, and has subsequently been endorsed by the legislatures of these states. Such government-petitioning conduct is not subject to antitrust liability, as the District Court, the Court of Appeals, and courts in related cases have *uniformly* held. There is no need for this Court to review this issue.

II. THE DECISION BELOW MAKES NO NEW LAW: THE COURT OF APPEALS' APPLICATION OF *NOERR-PENNINGTON* RELIES UPON AND ADHERES TO APPLICABLE PRECEDENTS FROM THIS COURT AND OTHER COURTS OF APPEALS.

The *Noerr-Pennington* doctrine unquestionably immunizes efforts to influence state governments in litigation. In *California Motor Transport*, 404 U.S. at 510-11, this Court recognized that "the right to petition extends to all depart-

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Circuit did not address *Noerr-Pennington* on appeal, as it was not the basis for the district court's denial of leave to amend. Thus, there is clearly no conflict, actual or implied, between *Forces Action* and the instant case.

ments of the Government," including the judiciary; and this Court further held that *Noerr-Pennington* applies to attempts to "use the channels and procedures of state and federal agencies and courts." Even Petitioners concede that this Court's decision in *California Motor Transport* "removes any doubt that *Noerr-Pennington* covered the conduct of litigation." Pet. at 23.

The breadth of the *Noerr-Pennington* doctrine is similarly well-established. For example, this Court has made clear that *Noerr-Pennington* applies even if there is an improper purpose or motive behind the petitioning, *see Noerr*, 365 U.S. at 138-39, even if defendants allegedly conspired with the government, *see City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 382-83 (1991), and even if the petitioning is "part of a broader scheme" to achieve an anticompetitive goal. *See Pennington*, 381 U.S. at 670.

Expressly relying upon this Court's decisions, the Court of Appeals properly recognized that Respondents are "immune from antitrust liability whether or not the injuries are caused by the act of petitioning or are caused by government action which results from the petitioning." App. 26a-27a. In this case, the Court of Appeals properly concluded that the *Noerr-Pennington* doctrine applied because (1) Respondents' conduct in negotiating and executing the MSA with the sovereign states is valid petitioning activity, (2) Petitioners' challenge to the legality of the MSA (and the related state "Escrow Statutes") constitutes a challenge to the government's response to petitioning conduct, and (3) *Noerr-Pennington* immunity can apply to a broader range of governmental conduct than the narrower "state action" immunity under *Parker v. Brown*.

1. The Court of Appeals, like the District Court, correctly ruled that Respondents' negotiation and execution of the MSA is protected under *Noerr-Pennington* as conduct

incidental to litigation with state governments. Because litigation activities are unquestionably entitled to *Noerr-Pennington* immunity, *see, e.g.*, *Cal. Motor Transp.*, 404 U.S. at 510-11, courts have consistently held that the decision to accept or reject an offer to settle litigation is protected under *Noerr-Pennington*. *E.g.*, *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1528 (9th Cir. 1991) (a decision to settle litigation is entitled to *Noerr-Pennington* immunity because it "is conduct incidental to the prosecution of the suit and not a separate and distinct activity which might form the basis for antitrust liability"), *aff'd on other grounds*, 508 U.S. 49 (1993); *Campbell v. City of Chicago*, 823 F.2d 1182, 1186 (7th Cir. 1987) (settlement with local government entitled to *Noerr-Pennington* immunity); *cf. Coastal States Mktg. v. Hunt*, 694 F.2d 1358, 1367 (5th Cir. 1983) ("Given that petitioning immunity protects joint litigation, it would be absurd to hold that it does not protect those acts reasonably and normally attendant upon effective litigation.").

The MSA was negotiated with the state attorneys general and governors, it was approved by state or federal courts in each of these states, and it was endorsed by the state legislatures. The MSA thus represents both the product of Respondents' joint defense of the State Lawsuits and, once approved, the product of Respondents' petitioning of the executive, judicial, and legislative branches of government. As another court has observed, the negotiation and implementation of the MSA are "precisely the type of activity the [*Noerr-Pennington*] doctrine was intended to protect." *PTI*, 100 F. Supp. 2d at 1193.

Petitioners' contention that the decision below is implicitly inconsistent with *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), is baseless. As the Court of Appeals correctly noted, *Broadcast Music* did not even address the applicability of *Noerr-Pennington*.

App. 30a. Rather, this Court ruled in *Broadcast Music* that defendants' conduct, which occurred years *after* a government decree was entered into, was not immunized by the specific terms of that decree, because the decree did not require defendants to engage in the challenged conduct. 441 U.S. at 13. The *Noerr-Pennington* doctrine was not raised, discussed, or decided by this Court in *Broadcast Music*; and as the Court of Appeals correctly noted, *Broadcast Music* is clearly inapplicable to the facts at issue here.

Similarly inapposite is the Second Circuit's decision in *PrimeTime 24 Joint Venture v. NBC, Inc.*, 219 F.3d 92, 102-03 (2d Cir. 2000). The *PrimeTime 24* case did not involve a government litigation settlement; rather, it involved copyright licensing negotiations solely involving private parties. Indeed, the Second Circuit recognized that *Noerr-Pennington* can immunize litigation settlement decisions, but ruled that the complaint before it challenged licensing negotiations that were not part of a litigation settlement. Accordingly, *PrimeTime 24* also involves a factual setting that is not relevant here.

Likewise, two other lower court cases that Petitioners cite, *Andrx Pharmaceuticals, Inc. v. Biovail Corp.*, 256 F.3d 799 (D.C. Cir. 2001), and *In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618 (E.D. Mich. 2000), are not applicable to – let alone inconsistent with – this case. These two cases, like *PrimeTime 24*, involved an agreement between two *private* parties, not a litigation settlement with the *government*. *See Cardizem*, 105 F. Supp. 2d at 635 ("the Agreement settled none of the infringement claims pending in the . . . action"). Indeed, the court in *Cardizem* distinguished the facts of that case from the facts here, noting that the

Cardizem agreement was "not a result of negotiations with a state attorney general or any government official." *Id.* at 642.[4]

2. Respondents successfully petitioned the states to resolve litigation by entering into the MSA, and thus the MSA (i.e., the government's response to petitioning) clearly falls within the scope of *Noerr-Pennington* immunity. This Court has long held that *Noerr-Pennington* protects private parties from liability not only for their efforts to induce government action, but also for the acts of government in response to such petitioning. *See, e.g.*, *Noerr*, 365 U.S. at 136 (recognizing that private parties are not liable under the antitrust laws "where a restraint . . . is the result of valid governmental action"); *Pennington*, 381 U.S. at 671 ("It is clear under *Noerr* that [plaintiff] could not collect any damages under the Sherman Act for any injury which it suffered from the action of the [government]."); *see also Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988) (*Noerr* immunity applies where injuries result from "government action"); 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 202c, at 159 (2d ed. 2000).

Accordingly, the District Court and Court of Appeals properly concluded that *Noerr-Pennington* protects not only the negotiation of the MSA, but also the actual implementation of the MSA once the negotiations were successful. Petitioners seek to evade *Noerr-Pennington* by characterizing Respondents' compliance with the MSA as "post-petitioning" conduct. Yet it is self-evident that since the MSA (which

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[4] Not only was the government not a party to the agreement in *Andrx*, but the government also subsequently filed suit challenging that agreement. *See Cardizem*, 105 F. Supp. 2d at 623 n.1. In contrast, the states in this case are parties to the MSA, support the legality of the MSA, and filed an *amicus curiae* brief with the Third Circuit in support of Respondents' position.

embodies the government-imposed settlement obligations) is within the scope of *Noerr-Pennington*, then compliance with the terms of the MSA is within the scope of *Noerr-Pennington* as well. Similarly, Petitioners seek to hold Respondents liable for the "Escrow Statutes" enacted by state legislatures after execution of the MSA; yet such statutes are obviously governmental conduct as well. It could scarcely be contended that private parties (like Respondents) could be held liable for a state legislature's decision to enact a statute.

In addition to this Court's precedents cited above, many lower courts have endorsed the uncontroversial principle that *Noerr-Pennington* protects private parties not only for their petitioning, but also for the "post-petitioning" effects of restraints imposed by the government. *E.g.*, *Greenwood Utils. Comm'n v. Miss. Power Co.*, 751 F.2d 1484, 1505 (5th Cir. 1985) ("First Amendment petitioning privileges would indeed be hollow if upon achieving a petitioned-for end the petitioner were then subjected to antitrust liability for his success."); *accord Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 301 (9th Cir. 1994) (*Noerr-Pennington* shields defendant from liability for injuries that are the "result of governmental action").

Petitioners' reliance on *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), is misplaced, because Petitioners here are challenging the negotiation and execution of an agreement with the government itself, not an agreement with a private litigant. In contrast, in *Allied Tube*, the plaintiff's alleged injury resulted from purely private conduct (i.e., petitioning of a *non-governmental* standard-setting organization). Thus, unlike *Allied Tube*, this suit does not raise the question of whether *Noerr-Pennington* should immunize the petitioning of private (non-governmental) entities by other private entities.

Petitioners also erroneously cite *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990). In *Superior Court Trial Lawyers*, this Court held that private parties are not entitled to immunity when they boycott the government to coerce the government to act. That ruling is not remotely relevant here, as there is (and could be) no allegation that the states were coerced by anticompetitive conduct into settling the litigation against Respondents. *Superior Court Trial Lawyers* does not hold that government petitioners may be liable if a plaintiff is harmed directly by the petitioning conduct. To the contrary, this Court has consistently ruled that *Noerr-Pennington* immunity extends to injuries directly caused by private petitioning. *See, e.g.*, *Allied Tube*, 486 U.S. at 499 ("where, independent of any government action, the anticompetitive restraint results directly from private action, the restraint cannot form the basis for antitrust liability if it is 'incidental' to a valid effort to influence government action").

3. Petitioners' argument seems to be based on their fundamentally mistaken assumption that *Noerr-Pennington* immunity cannot apply to Respondents' conduct if *Parker v. Brown* "state action" immunity does not also apply to such conduct. This assumption is unfounded in either precedent or logic. This Court has never suggested that the *Noerr-Pennington* and *Parker* doctrines are co-extensive, or that the two doctrines must be applied in unison. To the contrary, it is well-established that *Noerr-Pennington* protects conduct that does not fall within the scope of the more limited "state action" doctrine of *Parker v. Brown*. *See, e.g.*, *Omni*, 499 U.S. at 383 (*Noerr* and *Parker* are "complementary" doctrines); *see also* 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 229, at 518-19 (2d ed. 2000) (recognizing that *Noerr-Pennington* immunity is "broader" than *Parker* immunity).

For example, as this Court has consistently ruled, *Parker v. Brown* protects only private conduct that is "actively

supervised" by the States, while active supervision is clearly *not* a requirement for invoking *Noerr-Pennington* immunity. *See, e.g., Omni*, 499 U.S. at 370-84. Thus, the Court of Appeals' ruling (in *dicta*) that Respondents' conduct was not sufficiently "supervised" by the States to satisfy the "active supervision" requirement under *Parker* does not remotely undercut its conclusion that *Noerr-Pennington* immunity applies to such conduct.

Petitioners' implicit assumption that petitioning conduct must be "actively supervised" to be entitled to *Noerr-Pennington* immunity is simply untenable. Because no judicial decision supports such a view, Petitioners cite rulings on the *Parker* doctrine (including portions of the decision below that analyze *Parker* rather than *Noerr-Pennington*) in a misguided effort to buttress their arguments that *Noerr-Pennington* was not properly applied in this case. Pet. at 14-16. They do not, and cannot, cite any decisions that suggest that the "active supervision" requirement is relevant to *Noerr-Pennington*.

Because there is no real conflict between the Court of Appeals' application of *Noerr-Pennington* and any other judicial interpretation of that doctrine, Petitioners ask this Court to grant certiorari in order to "brighten[] the demarcation line between *Noerr-Pennington* and *Parker*." Pet. at 19. Yet the basis upon which the Court of Appeals distinguished the applicability of these two doctrines – and the "line" between these two doctrines – has been black-letter law for more than twenty years: "active supervision" may be a requirement of *Parker* immunity, but it is not a requirement of *Noerr-Pennington* immunity. *See, e.g., Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 61 (1985). The line does not need "brightening."

Petitioners' contention that there is some inchoate "inconsistency" in applying *Noerr-Pennington* but not *Parker* is also refuted by uniform case law in the lower courts. Federal courts have consistently held that *Noerr-Pennington* may apply even if *Parker* "state action" immunity does not. *See Bonollo Rubbish Removal, Inc. v. Town of Franklin*, 886 F. Supp. 955, 965 (D. Mass. 1995) (even if *Parker* did not apply, defendants "would still be shielded by the *Noerr-Pennington* doctrine") (citing *Omni*, 499 U.S. at 379-80, 383-84); *Bright v. Ogden City*, 635 F. Supp. 31, 33 (D. Utah 1986) ("Application of the *Noerr-Pennington* doctrine . . . does not depend upon a finding that the government action . . . [is] protected from antitrust liability by *Parker*."), *aff'd sub nom. Bright v. Moss Ambulance Serv., Inc.*, 824 F.2d 819 (10th Cir. 1987); *see also* 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 229, at 518 (2d ed. 2000) ("it seems clear that *Noerr* immunity for a private party's petition to the government in no way depends upon a finding of *Parker* immunity for the subsequent government action"). The uniform treatment of this issue by the lower courts eliminates any need for this Court to exercise its supervisory review functions.

III. PETITIONERS DID NOT ALLEGE THAT THE MSA VIOLATES THE COMMERCE CLAUSE AND THE INTERSTATE COMPACT CLAUSE, AND IN ANY EVENT, THEIR CONSTITUTIONAL ARGUMENTS ARE IRRELEVANT.

Petitioners assert that "even if settlements made with states were entitled to *Noerr-Pennington* immunity," Pet. at 5, this Court should nevertheless grant the writ of certiorari because the Court of Appeals declined to consider their claims that the MSA is unconstitutional. Yet Petitioners failed to allege constitutional claims in their complaint. Thus, as an initial matter, Petitioners' claims that the MSA is unconstitutional may be summarily disposed of, because this

Court ordinarily does not consider claims that were not properly asserted in the courts below. *See Gray v. Netherland*, 518 U.S. 152, 165 (1996) ("If the claim was not raised or addressed in federal proceedings, below, our usual practice would be to decline to review it.") (citing *Yee v. Escondido*, 503 U.S. 519, 533 (1992)); *see also Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991) (declining to consider a question not raised in the courts below).

Moreover, Petitioners' constitutional claims are irrelevant to the *Noerr-Pennington* issue, because it is well-established that *Noerr-Pennington* applies even if petitioned-for conduct is assumed to be unconstitutional. In *Omni*, 499 U.S. at 368, 384, this Court held that *Noerr-Pennington* immunity applied to the enactment of a city ordinance even though a state court had previously invalidated the ordinance because it violated both the South Carolina and U.S. Constitutions. Similarly, in *Bates v. State Bar of Arizona*, 433 U.S. 350, 363, 384 (1977), this Court ruled that antitrust immunity under *Parker* may apply even where the government's acts are unconstitutional.

The courts of appeals are in accord. *See Greenwood Utils.*, 751 F.2d at 1499 ("In the case of petitions for legislation that ultimately turns out to be unconstitutional, *Noerr-Pennington* protection still applies."); *Subscription Television, Inc. v. S. Cal. Theatre Owners Ass'n*, 576 F.2d 230, 233 (9th Cir. 1978) (petitioning "would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand a constitutional challenge").

Indeed, any contrary ruling would destroy the First Amendment underpinnings of *Noerr-Pennington*, as any advocate of government action would have to act at his peril in petitioning the government: to wit, a petitioner would become exposed to antitrust liability if the government's own

action in response to petitioning were subsequently held unconstitutional or otherwise invalid. That is clearly not the law. One of the leading antitrust authorities states flatly: "That anticompetitive legislation is subsequently held unconstitutional cannot make the legislative petitioner guilty of an antitrust violation." 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 206a, at 242 (2d ed. 2000). Similarly, as this Court ruled in *Omni*, a government petitioner does not forfeit his antitrust immunity even if the resulting government conduct is "substantively or even procedurally defective." 499 U.S. at 370-71.

In any event, Petitioners' constitutional attacks on the MSA are utterly baseless. Petitioners' primary argument is that the "Escrow Statutes" enacted by state legislatures are unconstitutional; yet Petitioners did not sue any states, and private Respondents obviously cannot be held liable for laws passed by state legislatures. Similarly, Petitioners argue that the MSA is an improper "compact" *among the states* that encroaches on Congress' power. Yet again, no states were sued; and as noted earlier, Congress has recognized the existence of the MSA and has expressly authorized the states to use MSA payments for all purposes "determined appropriate by the State[s]." 42 U.S.C. § 1396b(d)(3)(B) (2001).

Not surprisingly, similar constitutional challenges to the MSA have been uniformly rejected by other courts. *See, e.g.*, *Hise*, *supra*; *PTI*, *supra*; *Premium Tobacco Stores, Inc. v. Fisher*, 51 F. Supp. 2d 1099, 1102-07 (D. Colo. 1999); *Star Scientific, Inc. v. Early*, No. 3:00CV835 (E.D. Va. Mar. 26, 2001), *appeal docketed*, No. 1-1502 (4th Cir. Apr. 19, 2001); *N. Am. Trading Co. v. Nat'l Ass'n of Attorneys Gen.*, No. 01-CV-1600 (D.D.C. Sept. 18, 2001), *appeal docketed*, No. 01-7173 (D.C. Cir. Oct. 17, 2001).

In light of this uniformity among lower courts, there is no reason for this Court to reach out to address constitutional issues in a procedural context where both the Court of Appeals and the District Court properly declined to address them.

IV. THIS COURT SHOULD NOT GRANT THE WRIT BECAUSE THE JUDGMENT BELOW CAN ALSO BE DEFENDED ON AN ALTERNATIVE GROUND.

There is also an alternative ground, not included in the petition, which would independently support the Court of Appeals' judgment dismissing this action. The District Court ruled that the action should also be dismissed based on *Parker v. Brown* ("state action") immunity grounds. The Court of Appeals declined to endorse this alternative ruling due to an erroneous assumption regarding the scope of Petitioners' allegations. Indeed, when all is said and done, the core of Petitioners' argument is *not* that the Court of Appeals' application of the *Noerr-Pennington* doctrine is novel; rather, Petitioners essentially argue that the same misreading of Petitioners' allegations that led the Court of Appeals erroneously to reject *Parker* immunity in *dicta* should be used to undermine the clearly correct application of *Noerr-Pennington*. However, based on a proper reading of Petitioners' allegations, *Parker* immunity provides an alternative ground for affirming the decision below.[5]

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[5] This Court has recognized that:

> [w]ithout cross-petitioning for certiorari, a prevailing party may, of course, "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals," provided

As this Court first held in *Parker v. Brown*, 317 U.S. 341, 351 (1943), the Sherman Act does not prohibit "state action or official action directed by a state." In determining whether the *Parker* "state action" doctrine applies, this Court focuses on whether the challenged "conduct is that of the sovereign itself . . . ." *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984). Specifically, this Court has recognized that where "the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of 'clear articulation' and 'active supervision.'" *Id.*

The District Court ruled, as an alternative ground for dismissal, that Respondents' conduct in entering into the MSA was protected by *Parker* "state action" immunity. The court in *PTI*, 100 F. Supp. 2d at 1195-96, reached exactly the same conclusion in dismissing an antitrust challenge to the MSA. The Court of Appeals below rejected Respondents' *Parker* immunity argument on the grounds that Respondents might theoretically engage in post-MSA price-fixing without the "active supervision" of the States. App. 57a. Yet Petitioners did not allege any price-fixing; they challenged the MSA itself, which does not authorize price-fixing.

The MSA itself is clearly the result of "state action." Specifically, the Court of Appeals recognized that "each branch of state government had a role in the execution or operation of the [MSA]," App. 40a, that "it is evident the [MSA] was backed by clearly articulated state policy," App. 45a, and that "[t]he States here are actively involved in the maintenance" of the MSA. App. 56a. The Court of Appeals' analysis makes clear that the terms of the MSA were the

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that an affirmance on the alternative ground would neither expand nor contract the rights of either party established by the judgment below.

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 38-39 (1989) (quoting *Washington v. Yakima Indian Nation*, 439 U.S. 463, 476 n.20 (1979)).

product of direct state involvement, and that the MSA itself falls within the scope of *Parker* immunity. App. 38a-39a. Moreover, as parties to the MSA, Respondents would also fall within the scope of *Parker* immunity. *See, e.g., Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 74 (2d Cir. 1998) (a conclusion that settlement with the State was immunized under *Parker* "compels the conclusion that the [private party] defendants are shielded from antitrust liability").

The only reason the Court of Appeals rejected *Parker* immunity (in *dicta*) was that it assumed Respondents were "free to fix and raise prices" *after* the MSA was executed, and such post-MSA pricing decisions would not be "actively supervised" by the states. App. 46a. However, the Court of Appeals erred in relying on this assumption, because Petitioners never alleged that Respondents fixed prices.

In the District Court proceedings, plaintiffs categorically stated that their complaint "does not allege price fixing." Br. in Supp. of Pl.'s Mot. for Partial Summ. J. at 18 n.18; *see also* Br. for Defs.-Appellees at 24 n.9 & 36 (3d Cir.). Moreover, the Court of Appeals recognized that "the losses plaintiffs allege resulted from explicit provisions of the [MSA]." App. 17a. Petitioners "brought suit challenging sections of the [MSA] allegedly designed to maintain market share and restrict entry." App. 8a; *see* Am. Compl. ¶ 89 (challenging "the [MSA] on its face"). No provision of the MSA authorizes price-fixing, *see* App. 20a, and Petitioners made no such allegation.

In short, the Court of Appeals' *dicta* rejecting *Parker v. Brown* immunity was based on an erroneous reading of Petitioners' allegations. Once it is properly recognized that Petitioners were not alleging price-fixing, then the Court of Appeals' own legal analysis leads inexorably to the conclusion that the judgment below should be affirmed on the

alternative *Parker v. Brown* grounds, as well as on *Noerr-Pennington* grounds. Indeed, the Second Circuit has ruled that a litigation settlement agreement with a state agency is entitled to antitrust immunity under *Parker v. Brown*. *See Automated Salvage*, 155 F.3d at 67-76. The Court of Appeals did not address this case – presumably due to its mistaken belief that Petitioners were alleging price-fixing, which was not at issue in *Automated Salvage*.

As *dicta*, the Court of Appeals' analysis of *Parker* is immaterial to its judgment affirming the District Court. However, were the Court of Appeals' *Noerr-Pennington* ruling to be reviewed, an application of the *Parker* doctrine to the actual allegations in this case would provide an alternative basis for affirming the Court of Appeals.

CONCLUSION

For any and all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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